

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Smartmatic USA Corp., )  
Smartmatic International ) File No. 22-cv-0098  
Holding B.V., and SGO ) (WMW/JFD)  
Corporation Limited, )  
Plaintiffs, ) St. Paul, Minnesota  
vs. ) September 22, 2023  
 ) 2:58 p.m.  
Michael J. Lindell and )  
My Pillow, Inc., )  
Defendants. )  
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BEFORE THE HONORABLE JOHN F. DOCHERTY  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**(MOTIONS HEARING)**

Proceedings reported by certified court reporter;  
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1                                   P R O C E E D I N G S

2                                   IN OPEN COURT

3  
4                   THE COURT:   Good afternoon, everyone.   Please take  
5                   a seat.

6                   We are here this afternoon for a hearing on the  
7                   defendant's motion -- defendants', plural, motion to  
8                   reconsider one component of a previously ruled-upon order  
9                   granting a motion to compel in part.

10                  Let's begin with appearances, beginning with those  
11                  for the moving party, the defense.

12                  MR. KAPLAN:   Abraham Kaplan, Your Honor, for  
13                  defendants.

14                  MR. PARKER:   Andrew Parker, Your Honor, Parker,  
15                  Daniels, Kibort, for the defendants.

16                  THE COURT:   All right.   Good afternoon to both of  
17                  you.

18                  MR. PARKER:   Good afternoon, Your Honor.

19                  For the plaintiff?

20                  MR. BLOOM:   Michael Bloom for Smartmatic.

21                  MR. MANSKE:   William Manske also for the  
22                  plaintiffs.   Good afternoon, Your Honor.

23                  THE COURT:   Good afternoon.

24                  I thought what we would do is as the moving  
25                  party -- it looks like, Mr. Kaplan, you are arguing?

1 MR. KAPLAN: Correct, Your Honor.

2 THE COURT: Okay. So I thought 20 minutes,  
3 20 minutes, and then some time for rebuttal left sort of at  
4 Judge's discretion, depending on how much there is to rebut.

5 MR. KAPLAN: That sounds okay, Your Honor.

6 THE COURT: Okay. You have the floor.

7 MR. KAPLAN: Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MR. KAPLAN: Defendants recognize that motions to  
10 reconsider are usually not granted often as a matter of  
11 course, but defendants believe this is one of those  
12 instances that it needs to be considered both because of the  
13 gravity and the importance of the issues sought and the new  
14 evidence and errors of fact from the original motion to  
15 compel, Your Honor.

16 THE COURT: All right. Two questions, I guess,  
17 right off the bat, and I'm sorry to jump in with questions  
18 so quickly.

19 But you described -- you used the adjective "new"  
20 to describe the evidence. I -- or actually the law clerk  
21 constructed a little timeline for this motion, and it  
22 appears that you had your unsatisfactory interaction with  
23 Mr. O'Brien out in Los Angeles about seven weeks before the  
24 ruling on the motion to compel.

25 Is that, therefore -- I mean, how does that then

1       qualify as new evidence within the meaning of the standard  
2       for a motion for reconsideration?

3               MR. KAPLAN:   Sure, Your Honor.   So first, again,  
4       it's the discretion of the Court whether or not they want to  
5       consider items that could have been brought up in the  
6       supplemental record versus items then brought up in a motion  
7       to reconsider.   So it's not an automatic waiver that we  
8       can't bring it up today.   It's a discretion in front of  
9       Your Honor.

10              THE COURT:   I agree with that.   However, courts  
11       value consistency and predictability and therefore there are  
12       standards by which judges govern their discretion, and one  
13       of them is the new evidence rule, I'll call it that, that I  
14       have just described.

15              MR. KAPLAN:   Sure.   And, Your Honor, defendants  
16       are not only here today because of my interaction -- that  
17       specific one interaction with Mr. O'Brien.   In fact,  
18       Mr. O'Brien's subsequent declaration and LA County's clerk's  
19       subsequent declaration perhaps make that a side issue of why  
20       we're here today, Your Honor.

21              Now, as an officer of the court, I do not submit  
22       declarations lightly in a case, and my interactions with  
23       Mr. O'Brien I fully stand behind.   And Mr. O'Brien's  
24       interactions with defendants in this case and with the Court  
25       is one of the primary reasons why we're here today.

1           Because, Your Honor, when you submitted your  
2           August order to the parties in this case directing  
3           defendants to get information that was relevant in this  
4           case, was important in this case, but to get it from  
5           LA County, there's certain expectations --

6           THE COURT: To be clear, I didn't say get it from  
7           LA County. That was supplied by the parties later. When  
8           you read the order, it says the availability of other means,  
9           including Rule 45 subpoenas, is one factor in the Court's  
10          decision.

11          MR. KAPLAN: Can I ask Your Honor if I'm missing  
12          something? What else would be contemplated by that  
13          statement besides going to LA County?

14          THE COURT: I left that to the parties. What I  
15          said then and what I still believe now, but I'm sure you'll  
16          have something to say about it, is that Smartmatic does not  
17          have the source code and Smartmatic does not have the  
18          exemplar voting machine, and so that statement in the order  
19          was a statement of, as I think I put it, one cannot be  
20          compelled to produce that which one does not have.

21          MR. KAPLAN: And that's precisely why we're here  
22          today, Your Honor, because the statement in the order that  
23          Smartmatic does not have the source code or a machine, it's  
24          defendants' position that that is in error, and I would like  
25          an opportunity to explain my argument to you.

1           THE COURT: Well, you should because I didn't --  
2           if I missed it, point it out, but I didn't take that away  
3           from your memorandum. Your memo was, as I read it, here are  
4           the problems we're having with LA County. They don't return  
5           phone calls. They don't respond to e-mails. Months go by.  
6           Therefore compel Smartmatic to produce the source code and  
7           the voting machine.

8           MR. KAPLAN: Understood, Your Honor, and  
9           defendants' memorandum was written with the understanding  
10          that LA County said they did not have this material.

11          So if possible, Your Honor, I would like to argue  
12          all the potential arguments --

13          THE COURT: Of course, yes.

14          MR. KAPLAN: -- why the motion to reconsider  
15          should perhaps be considered and granted in this case --

16          THE COURT: Um-hmm.

17          MR. KAPLAN: -- and we not be limited, because of  
18          the unique circumstance in this case of an unexpected and  
19          competing declaration being submitted, to be solely limited  
20          to the original brief, Your Honor.

21          THE COURT: Go ahead.

22          MR. KAPLAN: So there's two broad categories of  
23          information that the defendants are seeking from Smartmatic  
24          in this case. The first is the source code used in the 2020  
25          election and the second is an exemplar of the machine used

1 in the 2020 election.

2 Now, I would like to start with the machine first,  
3 and I think it's important because Smartmatic's relationship  
4 with LA County for the machine is not of a contractor and  
5 inventor, Your Honor. It's of a licensor and a licensee.

6 They built the machine for LA County to use in the  
7 2020 election, and then under the contract they have a full  
8 license to market and then attempt to sell that same  
9 hardware to other jurisdictions across the United States and  
10 across the world, and that's unique and this is not a fact  
11 that came up in the original motion to compel between the  
12 parties.

13 THE COURT: Was that contract produced in  
14 discovery?

15 MR. KAPLAN: It was produced in discovery.

16 THE COURT: How long have you had it?

17 MR. KAPLAN: We've probably had it since February  
18 or March, Your Honor.

19 THE COURT: All right.

20 MR. KAPLAN: Again, I'm not saying it could not  
21 theoretically have been brought up in the first motion, but  
22 it wasn't considered in the parties' briefing or before this  
23 Court.

24 And can I -- I brought a copy of the contract  
25 today. This was submitted in Mr. Bloom's declaration in the



1 first motion to compel. Can I present a copy to Your Honor?

2 THE COURT: Are you introducing it as an exhibit?

3 MR. KAPLAN: I am, Your Honor.

4 THE COURT: Okay. Any objection?

5 MR. BLOOM: No objection.

6 THE COURT: Received.

7 (Document handed to the Court)

8 THE COURT: I'm going to mark this as Defense  
9 Exhibit Number 1. It's not marked; is that correct,  
10 Mr. Kaplan?

11 MR. KAPLAN: Correct. This should be Defense  
12 Exhibit -- it could be Number 1.

13 THE COURT: It will be Number 1.

14 MR. KAPLAN: So I point the Court to page 7 of 72.  
15 This is clause 2.4.1 where -- I'll give Your Honor an  
16 opportunity to turn to it.

17 THE COURT: Okay.

18 MR. KAPLAN: That "Effective upon achievement of  
19 the deliverable," skipping to the next line, "the County  
20 hereby grants the Contractor a perpetual, fully paid up,  
21 sublicensable, nontransferable license...to use all plans,  
22 diagrams, documentation, and tools relating to the Hardware  
23 components of the VSAP Solution, as developed, modified,  
24 maintained and supported by Contractor in accordance with  
25 the terms of this contract (collectively, 'VSAP Hardware.'"

1           Now, this is a very different position than the  
2           source code in this case, Your Honor. Smartmatic has the  
3           machines, they market the machines, and they have a part  
4           ownership of machines through this sublicense.

5           On page 13 of plaintiffs' original motion to  
6           compel, they don't say that they don't have an exemplar  
7           machine. They say they don't have a machine used in the  
8           2020 election.

9           And that wasn't our request in this case. Our  
10          request is for an exemplar, something similar, substantively  
11          identical to the machine. We didn't expect them to have a  
12          machine used in the 2020 election.

13          So it's an interesting choice of words that they  
14          used when representing they do not have a machine. And we  
15          do believe that they have a machine in this case,  
16          Your Honor, and we would specifically like to hear  
17          plaintiffs' statements on this fact.

18          THE COURT: Well, wait. Are you saying that  
19          you've got statements from plaintiff that they have such a  
20          machine or are you challenging plaintiff to include that in  
21          their argument?

22          MR. KAPLAN: I am asking plaintiff to include it  
23          in their argument.

24          THE COURT: Okay. So what do you have that  
25          supports the statement you just made, that plaintiffs, in

1 fact, do have a machine?

2 MR. KAPLAN: Your Honor, the contract grants them  
3 a license and we know, in fact, that they have been  
4 attempting to sell a machine that they used in LA County and  
5 other jurisdictions. Since 2020 their attempts to market  
6 the product to other jurisdictions is one of the crucial  
7 facts in this case.

8 THE COURT: So, Mr. Kaplan, would you agree that  
9 most of the things you've been talking about, maybe all of  
10 them, for the last five minutes is all stuff that you have  
11 had but that you have not put in your motion papers here,  
12 either in the motion to compel or in the motion for  
13 reconsideration?

14 MR. KAPLAN: I agree, Your Honor. I would point  
15 out that in the motion to compel we took plaintiffs'  
16 statements more at face value than perhaps we should have  
17 when they said they do not have a machine that was used in  
18 the 2020 election versus having an exemplar machine used in  
19 the 2020 election.

20 THE COURT: All right. So you have, then,  
21 apparently focused upon the difference between machine used  
22 in the 2020 election and exemplar machine. And on that  
23 ground you want the motion to compel re-opened or  
24 reconsidered?

25 MR. KAPLAN: On one of the grounds, Your Honor,

1 that would be one of the grounds to reconsider.

2 THE COURT: Okay. But why should I do that when  
3 all of this could have been in the motion to compel? I  
4 mean, it sounds as if you got a motion to compel. You  
5 didn't like the result, and that's understandable, and now  
6 you're looking for reasons to reconsider it and what you're  
7 doing is revisiting what I would consider tactical choices  
8 about which arguments to make in support of -- in the motion  
9 to compel litigation. Is that what's happening here? And  
10 if it is, how does it fit into the standard for a motion for  
11 reconsideration?

12 MR. KAPLAN: Well, Your Honor, we're here today  
13 because there's a compelling circumstance to revisit the  
14 motion to reconsider. Whether or not Mr. O'Brien's  
15 declaration is true of what he was saying, that he never  
16 told me certain things, is a compelling circumstance to come  
17 to this Court because of the conduct of LA County in dealing  
18 with the subpoena.

19 THE COURT: Maybe it's because it's Friday  
20 afternoon, but that, I'm afraid, kind of went by me. The  
21 conversations with Mr. O'Brien took place a long time before  
22 the motion to compel.

23 MR. KAPLAN: The original motion to compel,  
24 Your Honor?

25 THE COURT: The original motion to compel. I

1 mean, the conversations with Mr. O'Brien, as I understand  
2 it, took place weeks before we had a decision on the motion  
3 to compel. Am I right about that?

4 MR. KAPLAN: A decision, Your Honor, but in terms  
5 of the motion hearing, we argued it back in February.

6 THE COURT: Right. And you didn't seek  
7 supplemental briefing and you didn't go to Los Angeles to  
8 seek to enforce your subpoena. You went ahead with the  
9 hearing -- no. You went ahead and said nothing, got an  
10 order that you did not like, and now we've got a motion to  
11 reconsider.

12 I guess I'm not understanding why that's the route  
13 that we're going down instead of while the motion was under  
14 advisement saying: Hey, there's new information. Can I  
15 please submit a supplemental brief or go to the Central  
16 District of California and ask to have the subpoena enforced  
17 because, you know, O'Brien, by your account, is  
18 nonresponsive?

19 MR. KAPLAN: So, Your Honor, I think it's a little  
20 more nuanced than that.

21 THE COURT: Okay.

22 MR. KAPLAN: Because originally, after we had this  
23 first motion in front of this Court, the reason why we did  
24 not immediately file a motion to compel in LA County is to  
25 not have two competing motions pending in two jurisdictions

1 at the same time. We'd be asking an LA County court to move  
2 to compel on certain materials that the actual judge is  
3 considering in the home jurisdiction.

4 THE COURT: Am I correct that you have now filed a  
5 motion to compel in the Central District?

6 MR. KAPLAN: Correct, Your Honor.

7 THE COURT: So now we've got competing motions.

8 MR. KAPLAN: Well, at this point, Your Honor, I  
9 don't think defendants have any choice. We've been  
10 stonewalled everywhere and we need to do whatever is  
11 possible. Even though it's not normal motion practice, to  
12 file two motions in competing jurisdictions for the same  
13 issue.

14 And one more point, Your Honor, that at the  
15 hearing in front of this Court, as the transcript shows,  
16 this exact question came up, the question of should this  
17 motion be decided in Minnesota or should this motion be  
18 decided in California. And the Court agreed that the motion  
19 would be heard in Minnesota.

20 So we're not saying that we should have counted  
21 our eggs before they hatched, Your Honor, but our  
22 understanding of where this was going to be litigated and  
23 the potential effect of LA County saying they don't have  
24 certain things wasn't fully realized by us until we got the  
25 Court's August order, because we had understood that this --

1 items would be litigated in Minnesota and not in California.

2 And to continue, Your Honor. So that relates to  
3 the hardware in this case. Relating to the source code,  
4 there are two copies of the source code, Your Honor.  
5 There's a copy that's purportedly held in an escrow account,  
6 likely some third-party lab, that only LA County seems to  
7 have access to.

8 There's a separate, entirely different version of  
9 the source code. That version is held by an independent  
10 testing authority that it seems Smartmatic is the only one  
11 that has access to.

12 Smartmatic's contract with LA County is not over.  
13 It goes through 2027, and the product is constantly  
14 developed and improved. So it's defendants' position that  
15 the statement to say that Smartmatic does not have access to  
16 the source code or does not have the source code is in  
17 error, Your Honor.

18 Both versions of the source code are held by third  
19 parties. Likely LA County and Smartmatic do not have actual  
20 possession on their own servers of the source code, but  
21 that's not the requirement under Rule 34. Under Rule 34,  
22 possession, custody, and control is what courts looked at.  
23 And the legal right to access and practical access are the  
24 real questions that we need to ask, and Smartmatic  
25 absolutely has that, Your Honor.

1           And something as important as this, that the  
2           entire case may turn on this issue of our expert's ability  
3           to examine and determine the susceptibility and the  
4           vulnerability of these machines, may be the deciding factor  
5           in this case.

6           And incidentally, Your Honor, today is the very  
7           day that expert reports in this case have to be submitted,  
8           and defendants' expert has to submit an incomplete report  
9           without being able to examine the actual products he's  
10          opining on because Smartmatic is refusing to produce what  
11          they have access to, and that's what we are asking the Court  
12          to reconsider.

13          And, again, finally, Your Honor, I just want to  
14          point out -- it's rehashing some of my statements before,  
15          but just to express it one more time to the Court -- that  
16          the defendants' statements in this case that are alleged in  
17          plaintiffs' Complaint talk about the hackability of the  
18          machines, they talk about the internet connectivity of the  
19          machines, and they talk about the machines being susceptible  
20          to vote manipulation. Basic discovery in this case would be  
21          an opportunity to examine the machines.

22          Plaintiffs argue that we didn't bring up this  
23          argument in our original motion, that we argued truth versus  
24          a recklessness of the statements. And I would point the  
25          Court to page 7 of our original motion to compel, and I will



1 quickly read it to the Court. We're requesting these items  
2 because those items will yield information with respect to  
3 whether Smartmatic's products could be used to attack the  
4 election, whether Smartmatic's technology could have been  
5 used to manipulate the election, was susceptible to hacking,  
6 were capable of being connected to the internet.

7 It was never defendants' position solely that  
8 we're seeking these machines and source code to establish  
9 that they were hacked, they were penetrated, they were  
10 connected to the internet. The question is susceptibility,  
11 because that turns on whether defendants' statements were  
12 reckless or not.

13 And unless Your Honor has any other questions,  
14 that's all I have.

15 THE COURT: Thank you.

16 MR. BLOOM: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. BLOOM: As you can see, all defendants want to  
19 talk about this afternoon is the merits of the motion that  
20 Your Honor denied on August 1st, 2023. They say that they  
21 really, really need Los Angeles County's BMDs and source  
22 code, so the Court should reconsider its decision that it  
23 already made. Your Honor, a motion for reconsideration is  
24 not the forum for these arguments.

25 The requested relief -- the relief that they've

1 requested is available only in extraordinary circumstances.  
2 All they have done to show a change in circumstances from  
3 your August 1, 2023 order is -- all they've done is talk  
4 about a meet-and-confer that occurred in June 2023 in which  
5 Smartmatic was not involved.

6 We have identified three independent reasons why  
7 their motion fails.

8 THE COURT: Well, let's skip to the one that  
9 you've already mentioned, which is extraordinary  
10 circumstances.

11 You filed this lawsuit. I mean, you're the  
12 plaintiff. You're seeking at least a billion, with a "b,"  
13 dollars in damages. The allegedly defamatory statements  
14 center upon hackability and the possibility of vote  
15 manipulation.

16 And it does seem that the defense is having a very  
17 difficult time laying their hands upon the evidence that  
18 would show whether those statements are true, not true, were  
19 made with reckless disregard, were not made with reckless  
20 disregard.

21 If that's not extraordinary circumstances, what  
22 is?

23 MR. BLOOM: Your Honor, I think the extraordinary  
24 circumstances here is -- well, let me take a step back. I  
25 think the fallacy with their argument is that, as Your Honor

1 has already found, we do not possess the technology that  
2 they would need to actually challenge or to inspect -- to  
3 inquire whether those are -- to support their defenses on  
4 that.

5 THE COURT: Can you obtain it, though?

6 MR. BLOOM: Your Honor, as we mentioned in  
7 February 2023, we were very transparent with the Court about  
8 what we have. We have access to a database that's owned and  
9 maintained by Los Angeles County, and in that database we  
10 can access the source code that we prepared and sent to the  
11 independent testing authority and the trusted build file  
12 that the independent testing authority created.

13 LA County -- after that process happened, by law  
14 LA County was required to put those -- that data in escrow.  
15 Smartmatic could not access the escrow. And then  
16 Los Angeles County accessed the escrow and put that data in  
17 the machines.

18 And so based on those arguments and the  
19 declarations we submitted, Your Honor determined on  
20 August 1, 2023 that we did not have possession, custody, or  
21 control of what they had actually requested. And that  
22 remains the case.

23 I understand that they say that they really,  
24 really need this data and the technology, but Your Honor has  
25 already determined that we don't have it and nothing has

1 changed in the six weeks --

2 THE COURT: Well, the thing that has changed --  
3 you know, I am not happy that it's coming up at this  
4 point -- is that this contract has been put into evidence,  
5 Defense Exhibit Number 1, and it does say that Smartmatic  
6 does have a license for this technology. And Mr. Kaplan has  
7 put it to me that Smartmatic is actually trying to sell this  
8 technology or market this technology, choose a verb of your  
9 choice.

10 So does Smartmatic have access to this material  
11 such that they could, if ordered, have to produce it?

12 MR. BLOOM: Your Honor, we've always said if the  
13 Court ordered us to go into that database and get the code  
14 that was not put in the machines and that was -- ultimately  
15 it was put in escrow by LA County, we are willing to do it.  
16 We can't do it unless we have a court order, but if the  
17 Court were to order us to do it, we would do it.

18 THE COURT: Yes, but what happened on August 1st  
19 was that the representation was that the code that you could  
20 access is not the same code or might not be the same code  
21 that was actually used on election day.

22 So I guess the question is -- I mean, I've made  
23 the finding, and I'm so far sticking to it, that you don't  
24 have possession, custody, or control of the source code that  
25 was actually used in LA County on election day 2020.

1           And I guess just to bottom line it, Mr. Bloom, was  
2           I right or was I wrong?

3           MR. BLOOM: You were right, we do not. And  
4           Ms. Ward -- I don't know if Your Honor had an opportunity to  
5           look back at the transcript from the original motion to  
6           compel. Ms. Ward was very clear, my colleague -- you  
7           probably don't remember at this point -- she was very clear  
8           that we have no reason to believe that the source code that  
9           we have access to is any different than what was put in the  
10          machines.

11          But we cannot confirm that it was the same. After  
12          it left our possession, it went into escrow. LA County took  
13          the escrowed source code and put it in the machines. We  
14          don't have access to that code. It absolutely should be the  
15          same. We cannot verify that it is. And so in that sense  
16          Your Honor determined that we don't have possession of what  
17          was used in the election in November of 2020.

18          Now, Your Honor, I did want to address the BMD  
19          point. Mr. Kaplan has said that we have possession of a  
20          BMD, and I do want to address that. It seems to be based on  
21          a new interpretation of their request. I think every party,  
22          and even the Court, understood that their request was for a  
23          machine that was actually used in the election.

24          Regardless, I think I can moot that point right  
25          now because, as part of our expert report that we'll be

1 serving today, we'll be noting that our expert inspected a  
2 BMD that we have. It was not used in the 2020 election. It  
3 does not run on the same source code or same version of the  
4 source code that was used in the election.

5 We are going to be making that available for  
6 inspection. I don't know if that's going to satisfy their  
7 needs, but that is what we have in our possession and they  
8 are going to be able to look at it.

9 THE COURT: All right. So who does have access to  
10 what was indisputably used on election day in 2020? Is it  
11 LA County?

12 MR. BLOOM: My understanding is that -- if we are  
13 talking about the BMDs, LA County --

14 THE COURT: BMD, source code, both, actually.

15 MR. BLOOM: Understood. LA County has possession  
16 of the BMDs, is my understanding. When we even perform  
17 maintenance on BMDs, it's in a facility that LA County  
18 administers.

19 So I can't speak for LA County, if they want to  
20 come up with a legal theory of how they don't have  
21 possession of it. My understanding is they have possession  
22 of it.

23 And as to the source code, my understanding is  
24 also that if it is in escrow, then LA County can access it.  
25 LA County may have something to say about that, but I do

1 know that, under law, LA County had to put it in escrow and  
2 LA County put the escrow -- put the escrowed software into  
3 the machines.

4 And we now know from the declaration that  
5 Smartmatic submitted with its opposition to this case that  
6 the escrowed source code has not been deleted, which means  
7 that it still exists and it can still be obtained.

8 THE COURT: And that is the source code that  
9 beyond a doubt was used on election day?

10 MR. BLOOM: That's correct, Your Honor.

11 Now, Your Honor, I'll just make one more point. I  
12 think the Eighth Circuit is very clear on the circumstances  
13 here. We've cited three different Eighth Circuit opinions.  
14 We've cited an opinion from this district. They all say  
15 that if you uncover new evidence that's relevant to a  
16 pending motion, you have to come forward with that  
17 information before the motion is decided.

18 Here defendants had every opportunity to do that.  
19 They didn't. They waited until they got an adverse ruling  
20 and then they brought it to your attention. We think that's  
21 clearly improper under the Eighth Circuit policy.

22 Mr. Kaplan mentioned that they didn't do that  
23 because of the risk of inconsistent rulings from the Central  
24 District of California and this Court, and I'm at a loss as  
25 to what those inconsistent rulings would be considering we

1 did not challenge the relevance of their request.

2 I could see how had we challenged relevance, the  
3 Central District of California may say, oh, this is relevant  
4 and Your Honor may have said, no, it's not and then we have  
5 problem. I don't know where the inconsistency would have  
6 come from.

7 THE COURT: Well, what about the inconsistency  
8 that one order would have been directed to Los Angeles  
9 County and another would have been directed to Smartmatic?

10 MR. BLOOM: I don't see the problem in that.

11 THE COURT: All right.

12 MR. BLOOM: Either way they're getting what they  
13 need, and we can determine -- we can meet and confer about  
14 whether Smartmatic should be making code available for  
15 inspection or whether just LA County should because they  
16 have the escrowed version. I think that could have been  
17 resolved very easily.

18 THE COURT: All right. Anything further?

19 MR. BLOOM: That's all, Your Honor.

20 THE COURT: Thank you.

21 MR. BLOOM: Thank you.

22 MR. KAPLAN: Plaintiffs' counsel is flat-out wrong  
23 that we did not ask for an exemplar and we only asked for  
24 machines actually used in the 2020 election.

25 THE COURT: Well, it does sound like you are going



1 to get access to an exemplar, though.

2 MR. KAPLAN: So if I can cover that point in a  
3 second, Your Honor?

4 THE COURT: All right. I'll wait.

5 MR. KAPLAN: I specifically cite the Court to  
6 page 2 of plaintiffs' brief where they lay out each of our  
7 requests that are at issue in this motion, and the first one  
8 is an exemplar of each Smartmatic product used in the state  
9 of California to administer the 2020 president election.

10 We asked for this information at the outset of  
11 discovery, and it's astounding to hear that their expert is  
12 going to opine by examining an exemplar of a machine that  
13 has never been given to defendants until the close of  
14 discovery in this case and we get 30 days to examine it to  
15 do a rebuttal report.

16 So this is a machine that we asked for. This is a  
17 machine they said cannot be disclosed in this case because  
18 of the sensitivity. Yet they use it to prosecute defendants  
19 and they never gave an example in discovery. That's  
20 astounding, Your Honor, absolutely astounding, and massive  
21 prejudice to the defendants in this case. It's  
22 contradictory positions from plaintiffs and it's incredible  
23 that they would represent that to the Court without any  
24 explanation why.

25 In our motion to compel asking for an exemplar

1 machine, they refuse it and their expert report opines on it  
2 by examining the machine that we wanted to look at at the  
3 beginning of this case.

4 And if the machines are different, why is their  
5 expert examining it? If this wasn't the machine used in the  
6 2020 -- an exemplar of the machine used in the 2020  
7 election, what relevance is it in this case?

8 Their expert is examining it because it is an  
9 exemplar, they did have possession, and now they're going to  
10 use it as a battle ax against defendants and not let  
11 defendants examine it and use it as a defense. I'm sorry,  
12 Your Honor.

13 Number two, the statement they have no reason to  
14 believe that the source code is different, I'm not aware  
15 that this came up in the transcript of the first motion to  
16 compel, Your Honor.

17 Smartmatic is the one responsible to change the  
18 source code for any changes necessary. The contract  
19 requires this, that LA County at any time, if they want to  
20 change, needs to go to the plaintiffs to make the change in  
21 the source code.

22 The theoretical possibility that LA County, who  
23 is a government who doesn't know anything about these  
24 machines, would unilaterally make a change to the source  
25 code that the contractor built I think is ridiculous,

1 Your Honor.

2 There's no evidence to believe that it was  
3 changed. That should not be a reason to withhold discovery  
4 in this case. And even in the small possibility that it was  
5 changed, let us do discovery on both. Let's see the source  
6 code that Smartmatic thought was good enough for the 2020  
7 election and see what LA County said this isn't good enough,  
8 we're going to unilaterally change it and tweak it to make  
9 it different. We have an opportunity to see both.

10 During the hearing plaintiffs' counsel referenced  
11 Attorney Ward. She unequivocally said they have access to  
12 it. If the Court orders it, they can produce it. That is  
13 what we are asking plaintiffs to do in this case. They have  
14 possession, custody, and control; and we're asking they  
15 produce it.

16 Plaintiffs' counsel represents Smartmatic was not  
17 involved with our discussions with LA County. They went to  
18 get LA County's declaration to fight our ability to get  
19 material.

20 THE COURT: Well, by that standard, though, you  
21 would have been in discussions with LA County since you got  
22 a declaration. I mean, you filed a declaration of your  
23 interactions with them.

24 MR. KAPLAN: They didn't file a declaration of  
25 what they believe. I've been trying -- I filed a

1 declaration for myself. They didn't file a declaration from  
2 themselves. They went to Mr. O'Brien and presumably worked  
3 with him to develop a declaration. They went to LA County  
4 and presumably worked with them to develop a declaration,  
5 all to fight this motion in this court.

6 I want to remind the Court that this is in  
7 LA County and LA County's counsel that have completely  
8 ignored our attempts to reach them for a month and a half.

9 THE COURT: Which gets me back to my original --  
10 to the question I had when you were up here before. Why did  
11 you not take action in LA, the Central District of  
12 California, to enforce that subpoena?

13 I mean, I know you've talked about you didn't want  
14 competing motions, but one -- I mean, the inconsistency  
15 would be if LA County was ordered to do two inconsistent  
16 things by two courts or if Smartmatic was ordered to do two  
17 different things by two courts. But that was impossible  
18 here because one action was directed at Los Angeles County  
19 and one was directed at Smartmatic.

20 MR. KAPLAN: So, Your Honor --

21 THE COURT: I mean, this is the stuff that you are  
22 telling me is absolutely vital, these are the crown jewels  
23 of discovery in this particular case, and for months you did  
24 not try and get O'Brien to come -- to tell a judge to tell  
25 O'Brien to pick up the phone and respond.

1 MR. KAPLAN: So I know we said it already --

2 THE COURT: I know.

3 MR. KAPLAN: -- but bringing a motion in  
4 California federal court when the actual motion was being  
5 fought in Minnesota is not something a party would normally  
6 do, Your Honor.

7 And especially if that's sort of the main question  
8 on whether this motion hinges on -- I think that that should  
9 be recognized by the Court, that to ask us to go to LA and  
10 represent to the court we need this information, when normal  
11 discovery is gotten through a party, where the party said  
12 they had access to it, where the party said if the Court  
13 orders us we can produce it, to put up a potential burden on  
14 a third party is not something that we normally would have  
15 done. In hindsight, should we have done it? Absolutely.

16 And again I'm going to point the Court to the  
17 transcript of the hearing where Your Honor told the parties,  
18 sort of as a prelude, this is something that's going to be  
19 decided in Minnesota.

20 And plaintiffs' statement that they didn't  
21 challenge the relevance of the source code in the underlying  
22 motion to compel I do not believe is accurate, Your Honor.  
23 Plaintiffs put forward four or five arguments why the source  
24 code should not be allowed to be examined in this case, and  
25 one of the arguments was that defendants' statements were

1 outlandish, without a shred of proof, and that doesn't give  
2 them the ability to examine the source code. That's  
3 relevance. They're saying, outside of possession, outside  
4 of control, defendants don't deserve it in this case. They  
5 need to first come forward with more evidence of hacking, of  
6 internet connectivity, of all these items. So plaintiffs'  
7 position on that is mistaken, Your Honor. They did argue  
8 for a lot more than the fact that -- whether or not they had  
9 access to it.

10 And finally, Your Honor, I would like to point out  
11 to the Court that new information is not required in a  
12 motion to reconsider. I think we do have new information,  
13 but error alone is sufficient for the Court to potentially  
14 revisit its ruling and require them to produce a source code  
15 they have access to and a machine that they gave to an  
16 expert but refused to give to the defendants in this case.

17 Unless Your Honor has any other questions, that's  
18 all I have.

19 THE COURT: Thanks very much.

20 Mr. Bloom, I want to hear from you about  
21 Mr. Kaplan's point that the first set of requests for  
22 production of documents does say an exemplar of each  
23 Smartmatic product. You have taken the position we don't  
24 have the products that were actually used in the election,  
25 but the request was for an exemplar. Your expert has

1 examined it, but the defendants don't have it.

2 MR. BLOOM: That's correct, Your Honor.

3 THE COURT: Come on up.

4 MR. BLOOM: Oh, okay. That's correct, Your Honor.

5 We understood, even in the meet-and-confer process and  
6 throughout the litigation, that exemplar of a machine used  
7 in the 2020 election is a machine that was used in the 2020  
8 election.

9 It's also -- but it also doesn't matter,  
10 Your Honor, because whether we're talking about a machine  
11 that was used in the 2020 election or an identical copy of  
12 one that was used in the 2020 election, we don't have that.

13 What we're making available to them is a machine  
14 that is a BMD. It was not used in Los Angeles County. It  
15 does not run on the version of the software that was used in  
16 Los Angeles County. And therefore we think, no matter how  
17 you slice that RFP, this was not responsive.

18 THE COURT: Well, apparently it was good enough  
19 for your expert to examine, though.

20 MR. BLOOM: I think that's a point for  
21 cross-examination, Your Honor. I don't think it changes the  
22 fact that it wasn't responsive to the request. And either  
23 way, we are making that available to them now.

24 THE COURT: All right. Thank you.

25 Let's take a five- or ten-minute recess.

1 (Recess taken at 3:42 p.m.)

2 \* \* \* \* \*

3 (3:55 p.m.)

4 **IN OPEN COURT**

5 THE COURT: All right. This will be short. The  
6 motion is under advisement and order to follow. All right?

7 Anything else for today, Mr. Kaplan?

8 MR. KAPLAN: No, Your Honor.

9 THE COURT: Mr. Bloom?

10 MR. BLOOM: No, Your Honor.

11 THE COURT: Okay. Thanks very much. Court is  
12 adjourned.

13 (Court adjourned at 3:55 p.m.)

14 \* \* \*

15 I, Lori A. Simpson, certify that the foregoing is a  
16 correct transcript from the record of proceedings in the  
above-entitled matter.

17 Certified by: s/ Lori A. Simpson

18 Lori A. Simpson, RMR-CRR